

***APPENDIX E1: "Public
Constitutional Rights: The Driving
Force on Expenditures For the
Florida Judicial System,"
Professor Joseph Little***

MGT project # 1. Identifying constitutional and statutory mandates for essential judicial functions and services as prescribed by Chapter 2000-237 Laws of Florida.

Joseph W. Little, October 31, 2002

AMENDED DRAFT

**“Public Constitutional Rights”- The Driving Force on Expenditures
For the Florida Judicial System**

In the public mind, and largely in the judicial mind, the term “constitutional rights” focuses thought upon the rights of an individual. These individual rights impose limitations upon the power of the State in favor of a particular individual. Exemplary, are the right to trial by jury, Article I § 22 Florida Constitution, and the right not to be deprived of life, liberty or property without due process of law. Article I §9 Florida Constitution. The Florida Declaration of Rights, Article I, Florida Constitution, embodies numerous additional individual rights. In addition, the Bill of Rights of the United States Constitution and the Fourteenth Amendment to the United Constitution impose similar “individual rights” restrictions on the powers of the States.

In Chapter 2000-237, the Florida legislature indicated that the costs that rights protected by the Florida and United States Constitutions impose upon the state judicial system are to be examined. In fact, however, “individual rights” protected by the Florida Constitution subsume, complement or exceed those imposed by the United States Constitution in virtually all particulars. For this reason, and for others discussed by the Florida Supreme Court in its decision in Traylor v. State, 596 So.2d 957 (Fla. 1992),¹ the Florida Supreme Court has directed Florida trial courts to afford the Florida Constitution “primacy” in protecting of individual constitutional rights. Accordingly, this report will similarly place primary consideration on the portions of the Florida Constitution that require the provision of the identified essential services.

Notwithstanding the importance of individual rights in the American theory of government, a more general set of rights, which are of a category that has been broadly referred to as “Public constitutional rights,”² requires the state to provide a judicial system to resolve the huge number of private and public disputes *that invoke no individual constitutional right at all.*

Providing a base judicial system to resolve these mainline legal disputes imposes the central cost burden of the entire judicial system upon the state and its taxpayers. These costs cannot be eliminated. No one should dispute that our free democratic society is built upon the premise that protection of property rights and the freedom to enter enforceable contracts is a principal cornerstone of its existence. No one should dispute that these property and contract rights would not be worth their salt as "rights" if they were not readily enforceable in a court of law. In short, no populous, complex, market-driven society, such as ours in Florida, could emerge in a culture that did not guaranty these rights in a well developed, effectively functioning judicial system. Hence, it is these "public constitutional rights" that require the existence and the substance of the judicial system. By contrast, the "individual constitutional rights" primarily restrict the state in the manner in which it may employ its courts (and other powers) to the detriment of individuals.

The "public constitutional rights" guaranteed by the Florida Constitution may be further sub-classified as "structural public constitutional rights" and "general public constitutional rights." Among the most important of the "structural constitutional rights" are these:

Structural Public Constitutional Rights

The creation of the Florida court system. Article V §1 Florida Constitution³. For these purposes, the constitutional meaning of embodying the judicial system in the constitution is to deprive the legislature of the power to eliminate the existence of a state court system. Subsumed within this limitation is an implied constitutional obligation that the legislature provide adequate funds to operate the system.

The constitutional separation of powers doctrine found in Article II §3 Florida Constitution.⁴ The constitutional meaning of the separation-of-powers statement is to deprive the legislature of the power to supplant the judicial powers of the Article V courts or to transfer them to some other agency.

General Public Constitutional Rights

Among the most important of the "general public constitutional rights" are these:

Constitutionally prescribed "Basic rights,"⁵ stated as follows:

"All natural persons are equal before the law and have inalienable rights, among which are the *right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property.....*" (Italics supplied.)

Constitutionally protected "Access to courts,"⁶ stated as follows:

"The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Needless to say, should the day every come that the Florida legislature so underfunded the judicial system that the courts could not effectively function to enforce these "general public constitutional rights" in civil litigation - completely apart from any protection of the individual constitutional rights of defendants in criminal prosecutions -, then the public would rise up and demand that adequate courts be provided. Protecting these public constitutional rights requires the existence of a sophisticated judicial system. Providing this base judicial system thus imposes a primary fiscal burden upon the legislature and the taxpayer without any consideration of protecting individual rights within the operation of the system.

One more Florida "structural public constitutional right" figures importantly in the cost of the base judicial system; to wit, a constitutional prescription of the *number* of trial judges. On this point, the 1885 Florida Constitution was exact. It mandated the legislature to "provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof"⁷ and, in addition, to provide in every county "a county judge or county judges, in such number as the legislature shall provide."⁸

Although the current 1968 Florida Constitution has abandoned the direct prescription of an exact number of circuit court judges, it has not abandoned the constitutional mandate that the need for providing greater numbers be continually reviewed. In this regard, the current Florida Constitution allocates the Florida Supreme Court primary responsibility to make a "determination of the need for *additional* judges,"⁹ and allocates the legislature the final responsibility to accept

or modify the Supreme Court's recommendations.¹⁰ The italicized word - *additional*- succinctly embodies a key constitutional premise. The 1968 Constitution¹¹ did not anticipate that the number of judges would be *reduced* when the current judicial article (Article V) was adopted to supplant the 1885 Article V- *but only that the number would be increased*. Hence, at least for as long as Florida's population continues to grow, the structure of the Florida Constitution drives an continual enlargement of the number of trial judges and, concomitantly, an expansion of the entire judicial branch of government.

Although the provisions of the Florida Constitution that create these "public constitutional rights" seldom trigger court orders that directly result in the expenditure of public funds,¹² they do lay the constitutional foundation for creating the basic structure of the entire judicial system.

Chapter 2000-237

Individual Constitutional Rights - The Additional Marginal Costs

Imposed on the Florida Judicial System

As argued above, no complex society that bases the well being of its people upon these rights - to own and dispose of property, to engage freely in economic and other lawful activities, to contract, and to vindicate these rights in a fair system of justice - could exit in the absence of a well endowed judicial system. By contrast, history teaches us that certain successful civil societies do exist without providing the people a constitutional bill of individual rights, such as those found in the first ten amendments to the United States Constitution and the Florida Declaration of Rights (Article I Florida Constitution). The history and current example of Great Britain exemplifies this. Not only has that nation prospered for centuries without a written constitution but its non-written conventions also underlie most of our cherished individual constitutional rights. It would seem, therefore, that the cost of protecting *individual constitutional rights* does not constitute the primary source of the expense of providing the base judicial system in a complex and successful market-driven society (although it may be said to be the primary *responsibility* of American judicial systems), but is in fact a marginal cost.

This point should be of crucial important to decision makers. Whatever savings might be

made in paring back the judicial cost of protecting individual liberties would be at best a “marginal” saving. The primary fiscal burden of supporting an adequate judicial system, i.e., one that protects the public constitutional rights referred to above, would remain. Notwithstanding this, Chapter 2000-237 Laws of Florida focuses attention primarily, but not exclusively, upon the constitutional and statutory bases for providing essential services to protect individual constitutional rights in the judicial system. The tables below catalogue the essential elements identified in Chapter 2000-237 and relate them to a constitutional or statutory mandate.

Section numbers referred to section designations in Chapter 2000-237.

Section 4. State Courts System

(1)(a) Judges

Florida Supreme Court (Chap. 25 FSA):	mandated by Florida Constitution: Article V§1. This is primarily to protect public constitutional rights.
District Courts of Appeal(Chap. 35 FSA)	mandated by Florida Constitution: Article V§1. This is primarily to protect public constitutional rights.
Circuit Courts(Chap.26 FSA)	mandated by Florida Constitution: Article V§1. This is primarily to protect public constitutional rights.
County Courts(Chap. 34 FSA)	mandated by Florida Constitution: Article V§1. This is primarily to protect public constitutional rights.

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(b) Jury compensation.

Compensation and accommodations	mandated by statute; §40.24 Fla. Stat.
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Providing jury service is a duty of citizenship that the State may compel from its citizens without payment. Nevertheless, to the extent that payment should become necessary to obtain juries, then it would be constitutionally mandated to provide compensation to vindicate the right of trial by jury guaranteed to indigent criminal defendants. Article I §22 Florida Constitution.

(c) Court reporting services.

1. Necessary to meet constitutional requirement	The structure of the Florida Constitution ¹³ mandates the Florida Supreme Court to review judgments that impose the death penalty: the due process provision of Article I §9 Florida Constitution also guarantees a right of appeal from all criminal convictions in circuit courts, thus mandating the state to provide indigent criminal defendants transcriptions of trial records as required to perfect appeals. ¹⁴
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The constitutions restrain the State from depriving any person of life, liberty or property without due process of law. Nevertheless, the United States Supreme Court has never held that

convicted persons have a United States *constitutional right* to an appeal, except as is necessary to review imposition of death penalties.¹⁵ By contrast, the Florida Supreme Court has held that the structure of the Florida Constitution provides all criminal defendants a constitutional right of appeal from convictions in circuit courts.¹⁶ Hence, the Florida Constitution mandates that the state provide free court reporting services for indigent criminal defendants to preserve the record for review in death cases. Florida law is more generous than this. It provides for court reporters in all criminal proceedings and free transcripts for appeals from convictions brought by all indigent criminal defendants.

(d) Auxiliary aids and services (the disabled).

Auxiliary aids etc. disabled	Statutorily required.: See Chap. 553, Part V FSA.
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A disabled indigent criminal defendant would be entitled to whatever special assistance the disability would require to afford the required due process of law. Article I §9 Florida Constitution. Although physically infirmed persons may be excused from jury duty, §40.013(5) Fla. Stat., such a person might also demand accommodation as a constitutional imperative under the equal protection for the handicapped provision of Article I §2 Florida Constitution.

(e) Provision of facilities for Florida Supreme Court and District Courts of appeal.

Florida Supreme Court and District Courts of Appeal	Constitutionally mandated: Article V §§1 and 14 Florida Constitution. This mandate primarily protects public constitutional rights.
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(f) Foreign language translators and interpreters.

Foreign language	Constitutionally mandated in prosecutions of indigent criminal defendants to provide due process of law. Article I §9 Florida Constitution.
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(g) Staff and expenses of Judicial Qualifications Commission.

Judicial Qualifications Commission	Constitutionally mandated: Article V§12 Florida Constitution. This is a structural mandate rather than an individual rights mandate.
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Section 5. State's Attorney's Offices and prosecution expenses.

(1) State attorney and assistants:	Constitutionally mandated: Article V§17 Florida Constitution. This is a structural mandate rather than an individual rights mandate.
(2) Court reporting necessary to meet constitutional requirements.	Constitutionally mandated as stated in Section (4)(1)(c) above. [As a general proposition, the State has no constitutional right to an appeal. Accordingly, to the extent the Legislature wishes to seek review of adverse judicial rulings against the State, the requirement is statutory.]
(3) Witnesses summoned to appear for an investigation, preliminary hearing, or trial in a criminal case when the witnesses are summoned by a state attorney; mental health	The state attorneys have no constitutional mandate to prosecute any particular case. Hence, to the extent that these services are mandated to aid the prosecution, the mandate is statutory. By contrast, to the extent these

professionals, etc.	functions must be performed to provide an indigent criminal defendant due process of law, the mandate is constitutional. Article I §§9 (due process) and 16 (Compulsory process for witnesses); executed and augmented by statute. ¹⁷ §§394.773 and 916.115(2) Fla. Stat.
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Section 6. Public Defenders and Indigent defense costs.¹⁸

(1) Public defender, assistants and staff	Providing legal representation for certain indigent criminal defendants is mandated by constitution. ¹⁹ Article I §§9 and 16 Florida Constitution. Providing a system of public defenders (instead of private lawyers) to vindicate these rights is a structural mandate. Article V §18 Florida Constitution.
(2) Court reporting services to meet constitutional requirements.	Mandated by constitution as required to provide review of death sentences ²⁰ and to provide due process of law to indigent criminal defendants who seek to vindicate the Florida constitutional right to an appeal from all convictions. Article I §9 Florida Constitution.

<p>(3). Witnesses summoned to appear for an investigation, preliminary hearing, or trial in a criminal case when the witnesses are summoned on behalf of an indigent criminal defendant; mental health professionals, etc.</p>	<p>The state attorneys have no constitutional mandate to prosecute any particular case. Hence, to the extent that these services are mandated, the mandate is statutory. By constant, to the extent these functions must be performed to provide an indigent criminal defendant due process of law, the mandate is constitutional. Article I§§9 (due process)and 16 (Compulsory process for witnesses); implemented and augmented by statute.²¹ §§394.773 and 916.115(2) Fla. Stat.</p>
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Section 7. Court Appointed Counsel.²²

<p>(1) Conflict cases for indigents</p>	<p>Mandated by constitution²³ and implemented by statute §27.53(3) Fla. Stat.²⁴</p> <p>Post-conviction relief: the constitution mandates that public representation be provided indigents in post-conviction relief</p>
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	under some but not all circumstances. ²⁵
(2) Representation of indigents; non-criminal cases.	Mandated by constitution when the state brings an action to deprive an indigent parent of the parental rights in children ²⁶ in some but not all instances. ²⁷
(3) Court reporting services.	Mandated by constitution as required to provide review of death sentence and to provide due process of law to indigent criminal defendants who seek to vindicate the Florida constitutional right to an appeal from all convictions. Article I §9 Florida Constitution.
(4) Witnesses summoned to appear for an investigation, preliminary hearing, or trial in a criminal case when the witnesses are summoned on behalf of an indigent defendant; mental health professionals, etc.	Mandated by constitution as to indigent defendants: Article I §§9 (due process) and 16 (Compulsory process for witnesses); implemented and augmented by statute. ²⁸ §§394.773 and 916.115(2) Fla. Stat.
(5) Investigating and assessing the indigency of any person who seeks a waiver of court costs and fees, or any portion thereof, or applies for representation by a public defender or private attorney.	Constitutionally mandated to the extent that state wishes to impose these costs as a condition upon its obligation to provide these services to indigent accused persons. Article I §9 Florida Constitution.

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Endnotes

1. The Supreme Court's reasoning as set forth in Traylor v. State, at 962-964, is instructive:

"Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

"When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. [FN5] We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

FN5. Under the federalist principles expressed above, where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, this loss must be made known to each participating voter at the time of the general election. Cf. People Against Tax Revenue Mismanagement v. County of Leon, 583 So.2d 1373, 1376 (Fla.1991) ("This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.").

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" III. FLORIDA DECLARATION OF RIGHTS

"The text of our Florida Constitution begins with a Declaration of Rights--a series of rights so basic that the framers of our Constitution accorded them a place of special privilege. These rights embrace a broad spectrum of enumerated and implied liberties that conjoin to form a single overarching freedom: They protect each individual within our borders from the unjust encroachment of state authority--from whatever official source--into his or her life. Each right is, in fact, a distinct freedom guaranteed to each Floridian against government intrusion. Each right operates in favor of the individual, against government. This Court over half a century ago addressed the fundamental principle of robust individualism that underlies our system of constitutional government in Florida:

It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights ... have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance

to invade these vital rights of personal liberty and private property, "Thus far shalt thou come, but no farther." State ex rel. Davis v. City of Stuart, 97 Fla. 69, 102-03, 120 So. 335, 347 (1929). No other broad formulation of legal principles, whether state or federal, provides more protection from government overreaching or a richer environment for self-reliance and individualism than does this 'stalwart set of basic principles.'

"..... Each right and each citizen, regardless of position, is protected with identical vigor from government overreaching, no matter what the source. Id. at 552.

" Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hard-won and stoutly defended freedoms enumerated in our Declaration in its effort to preserve public order. Each law-abiding member of society is inclined to strike out at crime reflexively by constricting the constitutional rights of all citizens in order to limit those of the suspect--each is inclined to give up a degree of his or her own protection from government intrusion in order to permit greater intrusion into the life of the suspect. The framers of our Constitution, however, deliberately rejected the short-term solution in favor of a fairer, more structured system of criminal justice:

These rights [enumerated in the Declaration of Rights] curtail and restrain the power of the State. It is more important to preserve them, even though at times a guilty man may go free, than it is to obtain a conviction by ignoring or violating them. The end does not justify the means. Might is not always right.

"Under our system of constitutional government, the State should not set the example of violating fundamental rights guaranteed by the Constitution to all citizens in order to obtain a conviction. Bizzell v. State, 71 So.2d 735, 738 (Fla.1954). Thus, even here-- especially here--where the rights of those suspected of wrongdoing are concerned, the framers drew a bright line and said to government, 'Thus far shalt thou come, but no farther.'"

2. See, e.g., Miami Bridge Co. v. Miami Beach Ry. Co., 12 So.2d 438, 446 (Fla. 1943) ("If the courts do not have this power [i.e., to injoin illegal rates for public utilities], public utilities could invade the *constitutional rights of the public* and of individual members of the public, which fundamental rights are protected by the Bill of Rights of our Florida Constitution.")(Italics added.)

3. "The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality." Article V §1 Florida Constitution.

4."The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise nay powers appertaining to either of the othe4r branches unless expressly provided herein." Article II §3 Florida Constitution.

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5. Article I §2 Florida Constitution.
 6. Article I §21 Florida Constitution.
 7. Article V §6(2) Florida Constitution. (1885).
 8. Article V §7(2) Florida Constitution (1885).
 9. Article V §9 Florida Constitution (1968).
 10. Id.
 11. As amended in 1972 to add the current Article V.
 12. Chiles v. Children A, B, C, D, E, & F, 589 So.2d 260 (Fla.1991) is an exception. There, the Florida Supreme Court held that the structural "separation of powers" provision found in Article II §3 Florida Constitution invalidated a statute that purported to grant the governor certain budgetary control over appropriations to and expenditures of the judicial branch. Cf., State v. Florida Consumer Action Network, __ So.2d __ (Fla.1st DCA 2002.)
 13. Article V §3(b) Florida Constitution: "JURISDICTION. – The supreme court: (1) Shall hear appeals from final judgments of trial courts imposing the death penalty...." The mandate derives from the reasoning of the Florida Supreme Court expressed in Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1104 (Fla. 1996).
 14. The Florida Supreme Court has acknowledged that criminal defendants have a constitutional right to appeal. See note 15.
 15. Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1104 (Fla. 1996)("The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985) ('Almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors.')")
 16. Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1104 (Fla. 1996).("Therefore, we now recede from Creighton to the extent that we construe the language of article V, section 4(b) as a constitutional protection of the right to appeal. However, we believe that the legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals.)
 17. Rose v. Palm Beach County, 361 So.2d 135 (Fla.1978), acknowledged that a criminal

accused person's constitutional right of compulsory process of witnesses includes the right to have the state defray the reasonable costs of attending trial incurred by indigent witnesses.

18. The right of an accused to be represented by counsel in a criminal prosecution was recognized as a constitutional imperative long before the courts held that the public bore the burden to provide the representation for indigents. See, e.g., Cash v. Culver, 122 So.2d 179, 185 (Fla. 1960) ("In Messer v. State, 120 Fla. 95, 162 So. 146, we held that Section 11, of the Florida Declaration of Rights [1885 Constitution] proclaims the constitutional right to be heard by counsel as an indispensable aspect of due process. It is a right so essential to a fair trial that its denial cannot be tolerated. When asserted by an accused, as in the instant case, its refusal so completely saturates the trial with error that an ultimate judgment of conviction is considered completely invalid and unenforceable. In Deeb v. State, 131 Fla. 362, 179 So. 894, this Court again announced that the right to be heard by counsel when asserted by an accused in a criminal case is a mandatory organic rule of procedure in all criminal prosecutions in this State. See also Wood v. State, 1944, 155 Fla. 256, 19 So.2d 872; Floyd v. State, Fla.1956, 90 So.2d 105.")

19. The defendant in Collie v. State, 710 So.2d 1000, 1012 (Fla. 2nd DCA 1999), review denied, 722 So.2d 192 (Fla. 7, 1998), certiorari denied, 525 U.S. 1058, 119 S.Ct. 624, 142 L.Ed.2d 563, 67 USLW 3393 (1998), argued that the constitutional right to publicly provided counsel extended to certain non-criminal "sexual predator" proceedings against him. The court rejected this contention in a decision that illuminates the area:

Collie argues that an accused's constitutional right to counsel is guaranteed by the Sixth Amendment of the United States Constitution, which provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. Collie further argues that the Florida Constitution embodies the express right to be heard in person or to be represented by counsel or both, Art. I, § 16, Fla. Const., and where the right to counsel exists, an accused is entitled to counsel at every critical stage of the criminal proceedings. See United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (presence of counsel at critical confrontations operates to assure that accused's interests will be protected consistently with adversary theory of criminal prosecution); Owen v. State, 596 So.2d 985 (Fla.1992). Collie argues that he is indigent and that the right of indigent defendants to the assistance of court-appointed counsel is constitutionally mandated under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 16 of the Florida Constitution. This right is codified in sections 27.51-.52, Florida Statutes (1995), and Florida Rules of Criminal Procedure 3.111, 3.130, and 3.160. See also Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (indigent defendants have constitutional right to court-appointed counsel in felony prosecutions). However, the right to counsel only extends to criminal and quasi-criminal proceedings. See Hannah v. Larche, 363 U.S. 420, 440 n. 16, 80 S.Ct. 1502, 1513 n. 16, 4 L.Ed.2d 1307 (1960). We have already determined that the 1996 Act, as applied to this case, is remedial in nature and that the sexual predator designation and its accompanying requirements do not impose punishment. Moreover, the legislative intent behind the statute is civil, rather than criminal. See Hendricks, 521

U.S. at ---- - ----, 117 S.Ct. at 2081-82. Accordingly, we conclude that the sexual predator proceedings were not criminal or quasi-criminal in nature and that Collie had no constitutional right to counsel.

20. See, e.g., In re Amendment to Florida Rules of Criminal Procedure--Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So.2d 185, 197 (Fla. 1991)(“The Supreme Court has not only the authority, but the constitutional responsibility to ensure that indigent defendants are provided with competent counsel, especially in capital cases where the State seeks to take the life of the indigent defendant.”)

21. Rose v. Palm Beach County, 361 So.2d 135 (Fla.1978), acknowledged that a criminal accused person’s constitutional right of compulsory process of witnesses includes the right to have the state defray the reasonable costs of attending trial incurred by indigent witnesses.

22. The Florida Supreme Court has held that trial courts possess discretion to appoint a private attorney rather than the public defender to represent an indigent defendant. See, e.g., Escambia County v. Behr, 384 So.2d 147, 150 (Fla. 1980)(“We hold that the court has the option of appointing the public defender or private counsel. This is a matter within the sound discretion of the trial court judge. The court does not have to make any prerequisite findings or allow the county an opportunity to be heard before appointing private counsel.”)

The Florida Supreme Court has also held that it possesses inherent power, as a court, to insure that private counsel appointed by the courts to represent indigent criminal defendants are paid adequate consideration. Makemson v. Martin County, 491 So.2d 1109 (Fla.1986), certiorari denied, 479 U.S. 1282, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987). What is adequate compensation, however, is not determined by the customary charges of a particular lawyer but by what would be required to obtain adequate representation in the relevant market for legal services. Sheppard & White, P.A. v. City of Jacksonville, __ So.2d __ (Fla. 2002).

23. A specific case plainly acknowledging this right is hard to find, but see, In re Public Defender's Certification of Conflict, 709 So.2d 101, 102 (Fla. 1998)(acknowledging the “significant constitutional problem of an indigent's right to counsel.”)

24. This statute provides:

”(3) If, at any time during the representation of two or more indigents, the public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of conflict of interest, the public defender shall file a motion to withdraw and move the court to appoint other counsel. The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of

interest without requiring the disclosure of any confidential communications. The court shall permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client. If the court grants the motion to withdraw, it may appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender, in his or her capacity as such, or in his or her private practice, to represent those accused. However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict. The court shall advise the appropriate public defender and clerk of court, in writing, when making such appointment and state the conflict prompting the appointment. The appointed attorney shall be compensated as provided in s. 925.036.”

25. See, e.g. Williams v. State, 472 So.2d 738, 739 (Fla. 1985) (“We hold that the need for an evidentiary hearing does not automatically require appointment of counsel. Nonetheless, we hold that the trial judge's discretion must be exercised as set forth in Graham v. State, 372 So.2d 1363 (Fla.1979).”) “

26. See, e.g., : Department of Children and Family Services v. Natural Parents of J.B. 736 So.2d 111, 114 (Fla. 4th DCA 1999)(“We turn first to the trial court's major premise, that TPR cases are indistinguishable from criminal prosecutions. We have had previous occasion to consider this very same premise. In Ostrum v. Dep't of Health & Rehabilitative Services of the State of Florida, 663 So.2d 1359 (Fla. 4th DCA 1995), we addressed the contention that, because TPR cases are treated like criminal cases, counsel for a parent who concludes that no substantial appellate issue can be raised on appeal and who thus desires to withdraw must comply with the Anders procedure employed in criminal appeals. [FN4] In rejecting that premise, we said:

‘TPR cases are not criminal in nature. They are civil proceedings which happen to affect the substantial interests of the parents and children involved. Parents are entitled to appointed counsel at public expense in TPR proceedings. In the Interest of D.B., 385 So.2d 83, 90-1 (Fla.1980) (due process clauses of U.S. and Florida constitutions require appointment of counsel for indigent parents when permanent termination of parental rights may result); see also § 39.465(1)(a), Fla. Stat. (1993) and Fla. R. Juv. P. 8.320. The right to counsel in Anders is based on the Sixth Amendment, but the right to counsel in TPR cases does not arise under the Sixth Amendment. D.B., 385 So.2d at 89 (“Right to counsel in dependency proceedings, on the other hand, is governed by due process considerations, rather than the sixth amendment.”).

FN4. See Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

27. In Interest of D. B. And D.S., 385 So.2d 83, 87 (Fla. 1980)(“We reject the holdings of both the state circuit court and the United States District Court that all indigent participants in juvenile dependency proceedings are entitled, as a fundamental right, to have counsel supplied to them by the state. We find that a constitutional right to counsel necessarily arises where the proceedings can result in permanent loss of parental custody. In all other circumstances the

constitutional right to counsel is not conclusive; rather, the right to counsel will depend upon a case-by-case application of the test adopted in *Potvin v. Keller*, 313 So.2d 703 (Fla.1975). We recognize that in all instances the trial court must ensure that proper notice and an opportunity to be heard be provided to the participants. We find that when counsel is constitutionally required, the county, rather than the state, must compensate appointed counsel under a formula which recognizes both the obligation of the government to provide counsel and the obligation of the legal profession to represent the poor. As a result of these findings, we direct the judiciary of this state to follow the views expressed in this opinion rather than the views expressed by the United States District Court in *Davis v. Page*. We find that the federal district court should have refrained from passing on this new constitutional right and allowed the claim to be presented in the state system.”)

28. *Rose v. Palm Beach County*, 361 So.2d 135 (Fla.1978), acknowledged that a criminal accused person’s constitutional right of compulsory process of witnesses includes the right to have the state defray the reasonable costs of attending trial incurred by indigent witnesses.

***APPENDIX E2: Constitutional
Analysis of Chapter 29, F.S.,
Attorney George Meros***

Background

In 1998, the voters of the State of Florida passed Revision 7 to Article V of the Florida Constitution. That revision amends Article V, Section 14 and allocates to the state specific cost responsibilities related to the court system. See Art. V, § 14, Fla. Const. Revision 7 also set a schedule for the cost allocations to be “fully effectuated by July 1, 2004.” Art. XII, § 25, Fla. Const. To implement the requirements of Revision 7, the Florida Legislature passed CS/SB 1212, which was adopted as Chapter 2000-237, Laws of Florida, largely found in Chapter 29, Florida Statutes.

In Chapter 29, the Legislature defined, for purposes of implementing Section 14, Article V of the Florida Constitution, the “essential elements” of the state court system, the state attorneys’ offices, the public defenders’ offices and court-appointed counsel. See § 29.004-29.007, Fla. Stat. (2002).

Assigned Task

You have requested that we review the analysis provided by Professor Little of the University of Florida and to provide our own analysis regarding the constitutional and statutory bases for the essential elements of the state court system as defined in Chapter 29.

Summary of Conclusions

In sum, we agree with parts of Professor Little’s analysis, but disagree with the substance of some of his conclusions. In addition, we disagree with the implication of some of Professor Little’s conclusions to the extent that those conclusions could be read to imply that where a right exists, it necessarily requires the current court mechanisms that provide that right.

Professor Little suggests that the Florida Constitution, in Article V, contemplates that the number of judges would not be reduced, but rather that the number would only be increased as

Florida's population continues to grow. We respectfully disagree with that conclusion and suggest that Article V of the Florida Constitution is facially neutral with respect to the addition or reduction in the number of judges in the state.

Professor Little concluded "to the extent that payment should become necessary to obtain juries, then it would be constitutionally mandated to provide compensation to vindicate the right of trial by jury guaranteed to indigent criminal defendants." Because Florida courts have not yet determined the conditions, if any, under which the state would be constitutionally obligated to compensate juries for participating in this duty of citizenship, we are unable to conclude that such compensation would be constitutionally required.

While we agree with Professor Little's analysis with respect to the constitutional bases for providing a record of certain proceedings, we suggest that the Florida Constitution does not necessarily require "free court reporting services" in the form of a full-time court reporter staff. Similarly, while we believe the Florida Constitution requires the provision of court facilities and necessary security/custodial services, we suggest that the Florida Constitution would not require a full-time bailiff staff.

We do not purport to make policy decisions. Our focus was on the Constitutional requisites of the state court system, and relevant statutory requirements. We leave the policy decisions to the appropriate deliberative body – the Legislature.

Section 29.004 State courts system:

(1) Judges appointed or elected pursuant to chapters 25 [Florida Supreme Court], 26 [circuit courts], 34 [county courts] and 35 [district courts of appeal].

Article V, Section 1 of the Florida Constitution provides that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit court and county courts." The

Constitution provides that the supreme court shall consist of seven justices, each district court of appeal shall have at least three judges and the county courts (one per county) shall have one or more judges. See Art. V, §§ 3, 4 and 6, Fla. Const. It does not specify a minimum number of judges for the circuit courts.¹ The Legislature has the power to fix the number of appellate court districts and judicial circuits (following county lines). See Art. V, § 1, Fla. Const.

The Florida Constitution provides that “[t]he supreme court shall establish by rule uniform *criteria* for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits.” Art. V, § 9 Fla. Const. (1968) (emphasis added). That section further provides that if the Supreme Court finds that a need exists “for *increasing or decreasing the number of judges* or increasing, decreasing or redefining appellate districts and judicial circuits,” it must certify its findings to the Legislature. See id. The Legislature is required to consider the findings and recommendations of the Supreme Court and may accept or reject them. See id. The Legislature is expressly empowered to *increase or decrease* the number of judicial offices to a greater extent than recommended by the Supreme Court with a finding by two-thirds of the membership of both houses of the Legislature that such a need exists. See id.²

The Florida Constitution itself is facially neutral regarding whether the Legislature should increase or decrease the number of judges. In addition, in its abandonment of the pre-

¹ The number of circuit and county court judges are fixed by statute. See §§ 26.031 and 34.022, Fla. Stat. (2002).

² The Constitution also provides for the Legislature to *increase or decrease* the number of judges in the event the Supreme Court fails to certify its findings upon request of the Legislature. See Art. V, § 9.

1968 mechanism for determining a fixed number of circuit court judges, the Florida Constitution has substituted *no minimum* number of judges for those courts.³

(2) Jury compensation and expenses and reasonable juror accommodations when necessary.

The Florida Constitution does not expressly command the state to compensate jurors for their service. A juror's right to compensation is statutory. See Patierno v. State, 391 So. 2d 391 (Fla. 2d DCA 1980) (recognizing the right as statutory and not a matter of judicial prerogative); § 40.24, Fla. Stat. (2002). Because jury duty has been characterized as a "duty of citizenship" in Florida, it is unclear under what circumstances, if any, the state would have a constitutional obligation to compensate jurors.

Article I, Section 22 of the Florida Constitution provides that "[t]he right of trial by jury shall be secure to all and remain inviolate. The qualifications and number of jurors, not fewer than six, shall be fixed by law." No provision of the Florida Constitution expressly commands that Florida citizens must participate in jury service. However, the Florida Supreme Court has characterized jury service as a duty of citizenship. See e.g., Washington v. State, 98 So. 605, 606 (" . . . jury duty is one of the greatest responsibilities incident to citizenship, and it is the rule and policy of the law to secure men for this duty of approved integrity . . . ").

Florida statute also provides that meals and lodging may be provided to jurors when required by order of the court. § 40.24, Fla. Stat. (2002). Provision for the comfort of the jury is a "matter within the discretion of the court." Brown v. State, 12 So. 2d 292 (Fla. 1943) (holding that court did not abuse discretion nor was there harm to defendant where jurors were not served evening meal during deliberations).

³ The 1885 Florida Constitution required the Legislature to "provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof." Art. V, § 6(2) (1885).

(3) Reasonable court reporting services necessary to meet constitutional requirements.

Records of court proceedings are essential for preparation and adjudication of an appeal to protect due process. The Florida Supreme Court has recognized the constitutional right of an indigent criminal defendants (and participants in certain other court proceedings) to have the costs of transcripts paid by the government, and Florida statutes have implemented that right. There is no constitutional requirement, however, that the court system employ full-time court reporter staff.

In Florida, there are several circumstances in which the right to an appeal is constitutionally mandated:

- The Florida Constitution requires the Florida Supreme Court to review judgments that impose the death penalty and decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution. See Art. V, §3(b)(1) and (2)
- The Florida Supreme Court has held that all criminal defendants have a constitutional right of appeal from conviction in circuit courts to the district courts of appeal under Article V, Section 4(b). See Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1104 (“Therefore, we now recede from Creighton to the extent that we construe the language of article V, section 4(b) as a constitutional protection of the right to appeal.”). The Court noted, “However, we believe that the legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants’ legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals.” Id.

The Court provided a Constitutional floor for the Legislature - it must implement the constitutional rights to appeal in criminal cases in any reasonable manner that does not thwart

litigants' legitimate appellate rights. Therefore, where the provision of trial records is necessary to preserve a litigant's "legitimate appellate rights," the state must do so.⁴

The Florida Supreme Court has recognized the constitutional right of an indigent criminal defendant to have his court costs, including the cost of a transcript, paid for by the government. See State v. Byrd, 378 So. 2d 1231, 1232 (Fla. 1979). By statute, Florida provides free transcripts for all indigent criminal defendants. See § 939.07, Fla. Stat. Section 27.0061, Florida Statutes, provides that upon the demand of a defendant or defendant's attorney in a criminal case within the time allowed for taking an appeal and for the purpose of taking an appeal, the court reporter shall furnish with reasonable diligence a transcript of the testimony and proceedings. The costs shall be taxed as costs in the case. See id. Florida Statute also provides "if the court determines that the defendant [in a criminal case] is indigent and unable to pay costs, the appeal shall be a supersedeas without payment of costs." See § 924.17, Fla. Stat. (2002).

A Florida court has held, however, that although an indigent defendant has a right to transcripts without payment of costs for a direct appeal, there is no right to free transcripts for use in *preparation* of a post-conviction motion. See Carr v. State, 496 So. 2d 282 (Fla. 2d DCA 1986).⁵ The Florida Supreme Court has recognized that an indigent criminal appellant is entitled to a transcript of only the portion of the trial proceedings pertinent to his collateral attack on a post conviction motion. See Cassoday v. State 237 So. 2d 146, 147 (Fla. 1970).⁶ Through the Florida Rules of Appellate Procedure, the state conserves public funds by requiring that "[i]f a defendant's designation of a transcript of proceedings requires the expenditure of public funds,

⁴ Chapter 924 generally provides terms and conditions of appeals. Section 924.06, Florida Statutes sets forth the specific appeals a criminal defendant may take. See § 924.06, Fla. Stat. (2002).

⁵ "Rather, a prisoner seeking post-conviction relief must first prepare and file his motion before he may secure those portions of the record relevant to that motion." Carr, 495 So. 2d at 282.

⁶ The Florida Supreme Court stated that "[a] transcript of record need not be provided just for perusal or curiosity, nor for the purpose of merely enabling the prisoner to comb the record in the hope of discovering some flaw." Cassoday, 237 So. 2d at 147.

trial counsel for the defendant (in conjunction with appellate counsel, if possible) shall serve, within 10 days of filing the notice [of appeal], a statement of judicial acts to be reviewed, and a designation to the court reporter requiring preparation of only so much of the proceedings as fairly supports the issue raised.” Rule 9.140(e)(2)(A).

There is no *Constitutional requirement* that the state provide full-time court-employed court reporters and free complete paper transcripts all such cases. So long as the Legislature implements the rights to appeal in a reasonable manner, it is free to alter the mechanisms by which the rights are preserved. For example, the state might choose to contract court reporting services to private entities rather than maintain a fixed number of state-employed court reporters. It might also be able to provide free transcripts to attorneys in a format that reduces cost (such as digital format).

The Florida Supreme Court has also held that, where the State has chosen to establish an avenue of appeal of orders requiring continued involuntary hospitalization, indigents have a constitutional right to be provided, at public expense, an appellate record of the commitment proceedings. See Shuman v. State, 358 So. 2d 1333, 1335-36 (Fla. 1978) (finding the right to be grounded in due process, equal protection and equal access to the courts). The state has statutorily provided for hearings on involuntary placement to be recorded. See 394.467, Fla. Stat. (2002).

The state has statutorily mandated that written transcripts be kept in certain other proceedings conducted by the courts. See e.g., § 390.01115(4)(e) (for proceedings under the Parental Notice of Abortion Act); 744.109 (for proceedings under the Florida Guardianship Law); 741.30(6)(h) (for proceedings for an injunction for protection against domestic violence).

(4) Auxiliary aids and services for qualified individuals with a disability which are necessary to ensure access to the courts.

The Florida Constitution expressly provides that no person shall be deprived of any right because of physical disability. Art. I, § 1, Fla. Const. Therefore, a person's due process rights, protected under article I, section 9 of the Florida Constitution must be preserved regardless of physical disability. Section 29.004(4) recognizes various services that may need to be provided to individuals with physical disabilities to preserve those rights. In addition, Florida has enacted the Florida Americans with Disabilities Accessibility Implementation Act, Chapter 553, Part II, Florida Statutes.

(5) Construction or lease of facilities, maintenance, utilities, and security for the district courts of appeal and the Supreme Court.

Article V, section 1 of the Florida Constitution provides that the judicial power of the state shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. The need for proper facilities and security personnel for the operation of those courts derives from that Constitutional mandate. The Constitution expressly provides for the offices of clerk and marshal of the Florida Supreme Court and for the district courts of appeal. See Art. V, §§ 3 and 4. By statute, the marshal of the Florida Supreme Court is custodian of the Supreme Court building and grounds responsible for its security and maintenance. See § 25.71, Fla. Stat. (2002). The marshal of each of the five district courts of appeal is custodian of the headquarters occupied by the courts in their respective districts, responsible for their security and other duties directed by the court. See § 35.26, Fla. Stat. (2002). There is no constitutional requirement that court security staff, such a bailiffs, or maintenance staff, be maintained as full-time state employees.

(6) Foreign language translators and interpreters.

The Florida Supreme Court has held that the right of a non-English speaking defendant to an interpreter is grounded on due process and confrontation considerations of the Constitution. See Suarez v. State, 481 So. 2d 1201 (Fla. 1985), abrogation on other grounds recognized in Cherry v. State, 781 So. 2d 1040 (Fla. 2000), cert. denied, 476 U.S. 1178 (1986). Section 90.606, Fla. Stat. (2002) mandates interpreters to be appointed for witnesses who cannot understand English or others who have a disability that prevents them from being understood or from understanding questioning. Section 90.6063(2) mandates the appointment of an interpreter “[i]n all judicial proceedings and in sessions of a grand jury wherein a deaf person is a complainant, defendant, witness, or otherwise a party, or wherein a deaf person is a juror or grand juror.” Section 905.15 requires that the foreperson of a grand jury must appoint an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood.

(7) Staff and expenses of the Judicial Qualifications Commission.

Article V, Section 12 of the Florida Constitution constitutionally creates the judicial qualifications commission. The Constitution provides for the specific composition of the members of the commission. See Art. V, § 12(a)(1), Fla. Const. The Constitution also provides that the commission “shall hire separate staff” for each of two panels. See Art. V, § 12(f), Fla. Const. Section 43.30, Florida Statutes, implements the constitutional mandate.

29.005 State attorneys' offices and prosecution expenses.

(1) The state attorney of each judicial circuit and assistant state attorneys and essential staff as determined by general law.

The Florida Constitution mandates that "in each judicial circuit a state attorney shall be elected for a term of four years." Art. V, § 17. The Constitution does not require a full-time staff of assistant state attorneys. It provides that state attorneys shall appoint such assistant attorneys as may be authorized by law. See id. Chapter 27, Part II, Florida Statutes provides for the election of state attorneys and their duties. Section 27.181, Florida Statutes provides that assistant state attorneys "shall receive the allowances for expenses provided by law at the time of the appointment." That section also provides that the assistant state attorneys shall receive salaries (set by the state attorney). See § 27.181, Fla. Stat. (2002). Section 27.25 authorizes the state attorneys of each judicial circuit to employ and establish, "in such numbers as he or she shall determine, assistant state attorneys, investigators, and clerical, secretarial, and other personnel, who shall be paid from funds appropriated for that purpose."⁷ Also, the state attorney is authorized to employ an executive director. See § 27.25(2), Fla. Stat. (2002). Section 27.25 expressly recognizes that, "all payments for the salary of the state attorney and the necessary expenses of office, including salaries of deputies, assistants, and staff, shall be considered as being for a valid public purpose." § 27.25(3), Fla. Stat. (2002). Section 27.18 provides that state attorneys may procure assistance from any member of the bar when the amount of state business renders it necessary, by and with the consent of the court.

⁷ In addition, the state attorney may hire municipal or county police officers or sheriff's deputies on a full time basis as an investigator. See § 27.251, Fla. Stat. (2002).

(2) Reasonable court reporting services necessary to meet constitutional requirements.

The State has no constitutional right to an appeal. See State v. Creighton, 469 So. 2d 735 (Fla. 1985), receded from on other grounds by, Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996). Therefore, where the State may appeal, its rights to do so are granted by statute. See e.g. State v. M.K., 786 So. 2d 24, 256-26.⁸ Florida Statutes set out the circumstances under which the state may appeal in criminal cases. See §§ 924.07 and 924.071, Fla. Stat. (2002). Provision of transcripts, therefore, is necessary in those cases where the state is statutorily authorized to conduct an appeal. The provision of transcripts to the state attorney's office would also be necessary to foster appellate proceedings instituted by a defendants to preserve due process of law, as described above.

(3) Witnesses summoned to appear for an investigation, preliminary hearing or trial in a criminal case when the witnesses are summoned by the state attorney; mental health professionals who are appointed pursuant to s. 394.473 and required in a court hearing involving an indigent; and expert witnesses who are appointed pursuant to s. 916.115(2) and required in a court hearing involving an indigent.

⁸ In State v. M.K., the First District Court of Appeal summarized:

We begin with the proposition that the state's right to appeal is purely statutory. In State v. Creighton, 469 So.2d 735 (Fla.1985), the supreme court held that the state's right to appeal a final order in a *26 criminal case depends on the existence of a statute authorizing the appeal. Subsequently, the court applied this same principle to orders in juvenile delinquency proceedings. See E.N. v. State, 484 So.2d 1210 (Fla.1986); State v. C.C., 476 So.2d 144 (Fla.1985). Although the supreme court has since receded in part from Creighton by stating that the Florida Constitution does guarantee a citizen the right to appeal a final order, see Amendments to Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla.1996), the court left intact its holding in Creighton that the state's right to appeal depends on the existence of a statute. See State v. Allen, 743 So.2d 532 (Fla. 1st DCA 1997). Because the Florida Constitution does not afford the state a right to appeal, the state can appeal a final order in a criminal case or a juvenile delinquency proceeding only if there is a statute authorizing the appeal.

The right of state attorneys to prosecute any case is statutory, pursuant to the duties of that office set forth in Chapter 27, Part II, Florida Statutes. Where witnesses are summoned to assist in such prosecutions, the mandate to do so is derivative of those statutory duties.

Article I, Section 16 of the Florida Constitution provides that in all criminal prosecutions, the accused shall have the right to have compulsory process for witnesses. Sections 394.473 and 916.115(2) effectuate that right and protect due process. In Rose v. Palm Beach County, the Florida Supreme Court recognized that the protection of a person's right to compulsory process could require the expenditure of public funds. See 361 So. 2d 135 (Fla. 1978) (holding that expenditure of public funds was necessary to protect the rights of defendant and that trial court had inherent power to order prepayment of witness expenses to ensure fair trial for criminal defendant).⁹

Section 394.473, Florida Statutes expressly provides for compensation of experts who testify for an indigent in a court hearing conducted under the Florida Mental Health Act. Section 916.115(2), Florida Statutes expressly provides for compensation of experts appointed by a court to evaluate the mental condition of a defendant in a criminal case.

29.0006 Public defenders and indigent defense costs.

(1) The public defender of each judicial circuit and assistant public defenders and essential staff as determined by general law.

Article V, section 18 of the Florida Constitution mandates the election of public defenders in each judicial circuit. See also, §§ 27.50 to 27.605, Fla. Stat. (2002) generally,

⁹ The Court noted that while the district court could use contempt power to enforce subpoenas and protect compulsory process, that solution would not avoid disruption and delay. See Rose, 361 So. 2d at 138. The Court found, moreover, that to imprison an indigent person for not responding to a subpoena to appear in a distant court would violate that person's due process rights and the Florida Constitution's general prohibition of imprisonment for debt. See id.

which provides for public defenders. The Constitution does not require the appointment of a full-time staff of assistant public defenders.

In Gideon v. Wainwright, the United States Supreme Court held that the United States Constitution's Sixth Amendment right to counsel is a fundamental right that applies to the states via the Fourteenth Amendment. See Gideon, 372 U.S. 335 (1963). That Court has also stated that the rationale of Gideon (and the related holding of Powell v. Alabama, 287 U.S. 45 (1932)) extends to any criminal trial where an accused may be deprived of his liberty, and that in such cases, counsel is required by the Sixth Amendment to insure a fair trial. See Agersinger v. Hamlin, 407 U.S. 25, 32 and 37 (1972).¹⁰ The Florida Supreme Court, reading Article I, section 16 (Rights of the accused) of the Florida Constitution, together with Article I, Section 2 (Basic rights), has recognized a right for indigent defendants to court-appointed counsel in criminal prosecutions. See Traylor v. State, 596 So. 2d 957, 969 (Fla.1992). As the United States Supreme Court has recognized, the Florida Supreme Court has recognized that the right to counsel arises where imprisonment may result. See Rollins v. State, 299 So. 2d 586, 588-89. See also Padgett v. State, 743 So. 2d 70 (Fla. 4th DCA 1999) ("It is well-established that a criminal defendant facing incarceration has a right to counsel at every critical stage of the proceedings against him."). The Florida Supreme Court has held that a criminal defendant is entitled to counsel at the earliest of: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance. See Traylor, 596 So. 2d at 970. This right is codified in Florida Rules of Criminal Procedure 3.111(a).

¹⁰ Specifically, the Court held, "[t]herefore . . . absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." See Abersinger, 407 U.S. at 37.

Sections 27.51 and 27.52, Florida Statutes, effectuate the right to counsel and provide for public defenders' duties and for the determination of indigency. Section 27.54 recognizes that "all payments for the salary of the public defender and the necessary expenses of the offices . . . shall be considered as being a valid public purpose." The Florida Supreme Court has recognized that it has a "constitutional responsibility to insure that indigents are provided with competent counsel, especially in capital cases where the State seeks to take the life of the indigent defendant." In re Amendment to Florida Rules of Criminal Procedure - - Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185, 197 (Fla. 1991). The Legislature has provided for assistant public defenders by statute, though the Florida Constitution does not require for a full-time staff of assistant public defenders. See Art. V, § 18, Fla. Const. ("Public defenders shall appoint such assistant public defenders as may be authorized by state law").

In addition, due process requires that a person subject to an involuntary placement in a mental health facility be entitled to representation by counsel at significant stages of the proceedings. See In re Beverly, 342 So. 2d 481 (Fla. 1992). Section 394.467(4), Florida Statutes provides for the appointment of the public defender as counsel in cases regarding involuntary placement.

(2) Reasonable court reporting services necessary to meet constitutional requirements.

The need for transcripts for public defenders is derivative of the rights of those whom they represent (discussed above under 29.004(3)).

(3) Witnesses summoned to appear for an investigation, preliminary hearing or trial in a criminal case when the witnesses are summoned on behalf of an indigent defendant; mental health professionals who are appointed pursuant to s. 394.473 and required in a court hearing involving an indigent; and expert witnesses who are appointed pursuant to s. 916.115(2) and required in a court hearing involving an indigent.

The Constitutional and statutory bases for these "essential elements" arise once a prosecutor initiates an investigation or prosecution or following the filing of a petition for involuntary placement to a treatment facility pursuant section 394.467, Florida Statutes and in connection with other proceedings related to involuntary placement under the Florida Mental Health Act.¹¹ The public defenders' need for these services is derivative of the rights of those whom they represent.

Article I, section 16 of the Florida Constitution provides that in all criminal prosecutions, the accused shall have the right to have compulsory process for witnesses. Sections 394.473 and 916.115(2) effectuate that right and protect Due Process. In Rose v. Palm Beach County, the Florida Supreme Court recognized that the protection of a person's right to compulsory process could require the expenditure of public funds. See 361 So. 2d 135 (Fla. 1978) (holding that expenditure of public funds was necessary to protect the rights of defendant and that trial court had inherent power to order prepayment of witness expenses to ensure fair trial for criminal defendant).¹²

Section 394.473, Florida Statutes expressly provides for compensation of experts who testify for an indigent in a court hearing conducted under the Florida Mental Health Act. Section 916.115(2), Florida Statutes expressly provides for compensation of experts appointed by a court to evaluate the mental condition of a defendant in a criminal case.

¹¹ It is well settled that the seriousness of the deprivation of liberty which, of necessity, occurs when one is subject to involuntary placement in a mental health treatment facility, cannot be accomplished without due process of law. See Shuman v. State, 358 So. 2d 1333, 1335 (Fla. 1978). At a minimum, this due process contemplates reasonable notice, a hearing, and the right to effective assistance of counsel at all significant stages of the proceedings, i.e., all judicial proceedings and any other proceedings at which a decision could be made which might result in a detrimental change to the subject's liberty. In re Beverly, 342 So. 2d 481, 489 (Fla. 1977).

¹² The Court noted that while the district court could use contempt power to enforce subpoenas and protect compulsory process, that solution would not avoid disruption and delay. See Rose, 361 So. 2d at 138. The Court found, moreover, that to imprison an indigent person for not responding to a subpoena to appear in a distant court would violate that person's due process rights and the Florida Constitution's general prohibition of imprisonment for debt. See id.

29.007 Court-appointed counsel

(1) Private attorneys assigned by the court to handle cases where the defendant is indigent and cannot be represented by the public defender.

Recognizing that the counsel cannot adequately represent clients with conflicting interests, the Florida Supreme Court has held that “a lawyer representing clients with conflicting interests cannot provide the adequate assistance required” by the Sixth Amendment to the United States Constitution. See Bouie v. State, 5559 So. 2d 1113 (Fla. 1990).

Section 27.005, Florida Statutes defines “conflict attorney” as a “private attorney assigned by the court to handle the case of a defendant who is indigent and who cannot be represented by the public defender due to a conflict of interest or due to the public defender’s excessive caseload, as certified to the court by the public defender.” Section 27.53(3), Florida Statutes, requires the public defender to file a motion to withdraw and move to court to appoint other counsel when, during the representation of two or more indigent clients, the public defender determines that a conflict of interest exists. The court is required to permit withdrawal unless it determines the asserted conflict is not prejudicial to the client. See § 27.53(3) (2002). The court may then appoint other members of the bar unaffiliated with the public defender. See id. Also, if the court determines a conflict exists, it may appoint other counsel sua sponte. See id.

(2) Private attorneys appointed by the court to represent indigents or other classes of litigants in civil proceedings requiring court appointed counsel in accordance with state and federal constitutional guarantees.

Due process requires that parents are entitled to representation at proceedings in which permanent termination of parental rights may result. See In the Interest of D.B., 385 So. 2d 83,

89-91 (Fla. 1980).¹³ Section 39.013(1), Florida Statutes, provides that parents who are unable to afford counsel in dependency proceedings must be appointed counsel.

Under Florida Statutes, there are various other circumstances where the court is either required or authorized to appoint counsel (but not necessarily the public defender). For example, under section 390.01115(4)(a), Florida Statutes, in a proceeding in which a minor petitions for waiver of the notice requirements under the Parental Notice of Abortion Act, the court must appoint counsel if requested by the petitioning minor. In other proceedings, the court *may* appoint counsel, such as appointment of attorney for a child in various proceedings under section 61.401, Florida Statutes (relating to actions for dissolution of marriage, modification, parental responsibility, custody or visitation).

(3) Reasonable court reporting services necessary to meet with constitutional requirements.

The need for transcripts for court appointed attorneys is derivative of the rights of those whom they represent (discussed above under 29.004(3)).

(4) Witnesses summoned to appear for an investigation, preliminary hearing, or trial in a criminal case when the witnesses are summoned on behalf of an indigent defendant; mental health professionals who are appointed pursuant to s. 394.473 and

¹³ The Florida Supreme Court held:

We reject the holdings of both the state circuit court and United States District Court that all indigent participants in juvenile dependency proceedings are entitled, as a fundamental right, to have counsel supplied to them by the state. We find that a constitutional right to counsel necessarily arises where the proceedings can result in permanent loss of parental custody. In all other circumstances the constitutional right to counsel is not conclusive; rather, the right to counsel will depend upon a case-by-case application of the test adopted in Potvin v. Keller, 313 So. 2d 703 (Fla. 1975).

In the Interest of D.B., 385 So. 2d at 87. In Potvin, the Florida Supreme Court adopted the following criteria in determining whether due process required the offer of counsel: (i) the potential length of parent-child separation, (ii) the degree of parental restrictions on visitation, (iii) the presence or absence of parental consent, (iv) the presence or absence of disputed facts, and (v) the complexity of the proceeding in terms of witnesses and documents. See Potvin, 313 So. 2d at 706.

required in a court hearing involving an indigent; and expert witnesses who are appointed pursuant to s. 916.115(2) and requiring in a court hearing involving an indigent.

The Constitutional and statutory bases for these “essential elements” arise once the State initiates an investigation or prosecution or following the filing of a petition for involuntary placement to a treatment facility pursuant section 394.467, Florida Statutes and in connection with other proceedings related to involuntary placement under the Florida Mental Health Act.¹⁴ Appointed counsel’s need for these services is derivative of the rights of those whom they represent.

Article I, Section 16 of the Florida Constitution provides that in all criminal prosecutions, the accused shall have the right to have compulsory process for witnesses. Sections 394.473 and 916.115(2) effectuate that right and protect Due Process. In Rose v. Palm Beach County, the Florida Supreme Court recognized that the protection of a person’s right to compulsory process could require the expenditure of public funds. See 361 So. 2d 135 (Fla. 1978) (holding that expenditure of public funds was necessary to protect the rights of defendant and that trial court had inherent power to order prepayment of witness expenses to ensure fair trial for criminal defendant).¹⁵

Section 394.473, Florida Statutes expressly provides for compensation of experts who testify for an indigent in a court hearing conducted under the Florida Mental Health Act. Section

¹⁴ It is well settled that the seriousness of the deprivation of liberty which, of necessity, occurs when one is subject to involuntary placement in a mental health treatment facility, cannot be accomplished without due process of law. See Shuman v. State, 358 So. 2d 1333, 1335 (Fla. 1978). At a minimum, this due process contemplates reasonable notice, a hearing, and the right to effective assistance of counsel at all significant stages of the proceedings, i.e., all judicial proceedings and any other proceedings at which a decision could be made which might result in a detrimental change to the subject's liberty. In re Beverly, 342 So. 2d 481, 489 (Fla. 1977).

¹⁵ The Court noted that while the district court could use contempt power to enforce subpoenas and protect compulsory process, that solution would not avoid disruption and delay. See Rose, 361 So. 2d at 138. The Court found, moreover, that to imprison an indigent person for not responding to a subpoena to appear in a distant court would violate that person’s due process rights and the Florida Constitution’s general prohibition of imprisonment for debt. See id.

916.115(2), Florida Statutes expressly provides for compensation of experts appointed by a court to evaluate the mental condition of a defendant in a criminal case.

(5) Investigating and assessing the indigency of any person who seeks a waiver of court costs and fees, or any portion thereof, or applies for representation by a public defender or private attorney.

Where the State requires proof of indigency as a prerequisite to being afforded counsel, some form of investigation into the indigency would be necessary to preserve the right to counsel where due process requires counsel to be provided.

***APPENDIX E3: Summary
Comparison of Legal Opinions
Relative to Chapter 29, F.S.***

SUMMARY COMPARISON OF LEGAL OPINIONS

CHAPTER 29, F.S.

In order to determine the constitutional implications of the essential elements of the judicial system listed in Chapter 29, F.S., MGT subcontracted with Professor Joseph Little, University of Florida Levin College of Law, and George Meros, of GrayHarris, to provide legal opinions on whether and to what extent the Chapter 29, F.S., elements are constitutionally mandated. These attorneys generally agreed on the basic constitutional status of Chapter 29, F.S., elements. (A notable exception is the issue of juror compensation, which is discussed on page 2.) Professor Little and Mr. Meros appear to disagree primarily on the degree to which constitutionally mandated services are required to be provided. Both attorneys have also offered opinions on selected elements as proposed by MGT, which are illustrated in Chapter 3.

29.004 State courts system. – For purposes of implementing s. 14, Art. V of the State Constitution, the essential elements of the state courts system are as follows:

- (1) Judges appointed or elected pursuant to chapters 25, 26, 34, and 35, and essential staff, expenses, and costs as determined by general law.
- (2) Juror compensation and expenses and reasonable juror accommodations when necessary.
- (3) Reasonable court reporting services necessary to meet constitutional requirements.
- (4) Auxiliary aids and services for qualified individuals with a disability which are necessary to ensure access to the courts. Such auxiliary aids and services include, but are not limited to, sign-language interpreters, translators, real-time transcription services for individuals who are hearing impaired, and assistive listening devices. This section does not include physical modifications to court facilities; noncourtroom communication services; or other

accommodations, auxiliary aids, or services for which the counties are responsible pursuant to s. 14, Art. V of the State Constitution.

- (5) Construction or lease of facilities, maintenance, utilities, and security for the district courts of appeal and the Supreme Court.
- (6) Foreign language interpreters and translators essential to comply with constitutional requirements.
- (7) Staff and expenses to the Judicial Qualifications Commission.

	LITTLE	MEROS
(1)	Judges: Constitutionally mandated. Number of judges can only be increased, not decreased.	Judges: Constitutionally mandated. Number of judges can be increased or decreased. Constitution is facially neutral on this point.
(2)	Juror Compensation and Expenses, including accommodations: to the extent that payment should become necessary to obtain juries, then it would be constitutionally mandated to provide compensation to vindicate the right of trial by jury guaranteed to indigent criminal defendants.	Juror Compensation and Expenses, including accommodations: because Florida courts have not yet determined the conditions, if any, under which the state would be constitutionally obligated to compensate juries for participating in this duty of citizenship, no conclusion is reached that such compensation would be constitutionally required.
(3)	Reasonable court reporting services: Constitutionally mandated. The state is to provide free court reporting services for indigent criminal defendants to preserve the record for review in death cases.	Reasonable court reporting services: Constitutionally mandated. A record of certain proceedings is constitutionally mandated, but the constitution does not necessarily require "free court reporting services" in the form of a full-time court reporter staff or free complete paper transcripts.
(4)	Auxiliary aids and services: A disabled indigent criminal defendant would be entitled to whatever special assistance the disability would require to afford the required due process of law.	Auxiliary aids and services: An indigent criminal defendant's due process rights protected under Article 1, section 9 of the Constitution must be preserved regardless of physical disability.
(5)	Construction or lease of facilities, maintenance, utilities, and security for the DCA and Supreme Court: Constitutionally mandated to protect public constitutional rights.	Construction or lease of facilities, maintenance, utilities, and security for the DCA and Supreme Court: Constitutionally mandated deriving from provision that judicial power of the state shall be vested in a supreme court, DCA, circuit courts

	LITTLE	MEROS
		and county courts. However, there is no constitutional requirement that court security staff, such a bailiffs, or maintenance staff, be maintained as full-time state employees.
(6)	Foreign language translators and interpreters: Constitutionally mandated in prosecutions of indigent criminal defendants to provide due process of law.	Foreign language translators and interpreters: Constitutionally mandated for indigent criminal defendants. Even where due process requires Florida's courts to provide certain services to qualified indigent litigants, Florida law does not require the courts to provide those same services to non-indigent litigants. The State does not have to provide this service to indigent civil litigants, except in cases where the litigant's interest in the litigation is so fundamental that it outweighs the State's need to offset the costs of its judicial system.
(7)	Judicial Qualifications Commission: Constitutionally mandated.	Judicial Qualifications Commission: Constitutionally mandated as well as "staff " for each of two panels.

29.005 State attorneys' office and prosecution expenses. – For purposes of implementing s. 14, Art. V of the State Constitution, the essential elements of the state attorneys' offices are as follows:

- (1) The state attorney of each judicial circuit and assistant state attorneys and essential staff as determined by general law.
- (2) Reasonable court reporting services necessary to meet constitutional requirements.
- (3) Witnesses summoned to appear for an investigation, preliminary hearing, or trial in a criminal case when the witnesses are summoned by a state attorney; mental health professionals who are appointed pursuant to s. 394.473 and required in a court hearing involving an indigent; and expert witnesses who are appointed pursuant to s. 916.115(2) and required in a court hearing involving an indigent.

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(1)	State attorney of each circuit and assistant state attorneys and essential staff as determined by general law: Constitutional mandate.	State attorney of each circuit and assistant state attorneys and essential staff as determined by general law: State attorney constitutionally mandated, but not a full-time staff of assistant state attorneys – only as authorized by law.
(2)	Court reporting necessary to meet constitutional requirements: Constitutionally mandated pursuant to discussion under state courts system section above. However, the State has no constitutional right to an appeal – accordingly, to the extent the Legislature wishes to seek review of adverse judicial ruling against the State, the requirement is statutory.	Court reporting necessary to meet constitutional requirements: the State has no constitutional right to an appeal. Statute does grant right to appeal under certain circumstances. Provision of transcripts, therefore, is necessary in those cases where the state is statutorily authorized to conduct an appeal.
(3)	Witnesses, expert witnesses, and mental health experts: State attorneys have no constitutional mandate to prosecute any particular case, so to the extent these services are mandated to aid the prosecution, the mandate is statutory.	Witnesses, expert witnesses, and mental health experts: The right of state attorneys to prosecute any case is statutory, so to the extent these services are needed to assist in such prosecutions, the mandate is statutory.

29.006 Public defenders and indigent defense costs. – For purposes of implementing s. 14, Art. V of the State Constitution, the essential elements of the public defenders' offices are as follows:

- (1) The public defender of each judicial circuit and assistant public defenders and essential staff as determined by general law.
- (2) Reasonable court reporting services necessary to meet constitutional requirements.
- (3) Witnesses summoned to appear for an investigation, preliminary hearing, or trial in a criminal case when the witnesses are summoned on behalf of an indigent defendant; mental health professionals who are appointed pursuant to s. 394.473 and required in a court hearing involving an indigent; and expert witnesses who are appointed pursuant to s. 916.115(2) and required in a court hearing involving an indigent.

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(1)	Public Defenders of each circuit, assistant public defenders and essential staff as determined by general law: Legal representation of indigent criminal defendants is a constitutional mandate. Providing a system of public defenders (instead of private lawyers) to vindicate these rights is a structural mandate (Article V, §18).	Public Defenders of each circuit, assistant public defenders and essential staff as determined by general law: Article V, §18 mandates the election of public defenders in each circuit, but the constitution does not require the appointment of a full-time staff of assistant public defenders. The provision of assistant public defenders is a statutory right.
(2)	Court reporting necessary to meet constitutional requirements: Mandated by constitution as required to provide review of death sentences and to provide due process to indigent criminal defendants who seek to vindicate the constitutional right to an appeal from all convictions.	Court reporting necessary to meet constitutional requirements: The need for transcripts for public defenders is derivative of the rights of those they represent (discussed above under 29.004(3)).
(3)	Witnesses, expert witnesses, and mental health experts: The state attorneys have no constitutional mandate to prosecute any particular case. Hence, to the extent these services are mandated, the mandate is statutory. By contrast, to the extent these functions must be performed to provide an indigent criminal defendant due process, the mandate is constitutional.	Witnesses, expert witnesses, and mental health experts: The constitutional and statutory bases for these functions arise once a prosecutor initiates an investigation or prosecution or following the filing of a petition for involuntary placement to a treatment facility (F.S. §394.467) and in connection with other involuntary placement proceedings relating to the Florida Mental Health Act. The public defenders' needs for these services is derivative of the rights of those they represent.

29.007 Court-appointed counsel – For purposes of implementing s. 14, Art. V of the State Constitution, the essential elements of the court-appointed counsel are as follows:

- (1) Private attorneys assigned by the court to handle cases where the defendant is indigent and cannot be represented by the public defender.
- (2) Private attorneys appointed by the court to represent indigents or other classes of litigants in civil proceedings requiring court-appointed counsel in accordance with state and federal constitutional guarantees.
- (3) Reasonable court reporting services necessary to meet constitutional requirements.
- (4) Witnesses summoned to appear for an investigation, preliminary hearing, or trial in a criminal case when the witnesses are summoned on behalf of an indigent defendant; mental health professionals who are appointed pursuant to s. 394.473 and required in a court hearing involving an indigent; and expert witnesses who are appointed pursuant to s. 916.115(2) and required in a court hearing involving an indigent.
- (5) Investigation and assessing the indigency of any person who seeks a waiver of court costs and fees, or any portion thereof, or applies for representation by a public defender or private attorney.

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(1)	Conflict cases for indigents: Mandated by constitution (not explicitly, but see <u>In re Public Defender's Certification of Conflict</u> , 709 So.2d 101, 102 (Fla. 1998)) and implemented by statute (F.S. §27.53(3)). The constitution mandates that public representation be provided indigents in post-conviction relief under some but not all circumstances.	Conflict cases for indigents: Mandated by Sixth Amendment to the U.S. Constitution, as set out in <u>Bouie v. State</u> , 5559 So.2d 1113 (Fla. 1990).
(2)	Representation of indigents in non-criminal proceedings: Mandated by constitution when the state brings an action to deprive an indigent parent of the parental rights in children in some but not all instances.	Representation of indigents in non-criminal proceedings: Due process requires that parents are entitled to representation at proceedings in which permanent termination of parental rights may result.
(3)	Court reporting necessary to meet constitutional requirements: Mandated by constitution as required to provide review of death sentence and to provide due process of law to indigent criminal defendants who seek to vindicate the constitutional right to an appeal from all	Court reporting necessary to meet constitutional requirements: The need for transcripts for court-appointed attorneys is derivative of the rights of those they represent (discussed above under §29.004(3)).

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	convictions.	
(4)	Witnesses, expert witnesses, and mental health experts: Mandated by constitution as to indigent defendants by Article I §§9 and 16, and implemented and augmented by statute (F.S. §§394.773 and 916.115(2)).	Witnesses, expert witnesses, and mental health experts: The constitutional and statutory bases for these functions arise once a prosecutor initiates an investigation or prosecution or following the filing of a petition for involuntary placement to a treatment facility (F.S. §394.467) and in connection with other involuntary placement proceedings relating to the Florida Mental Health Act. The public defenders' needs for these services is derivative of the rights of those they represent.
(5)	Investigating indigency: Constitutionally mandated to the extent the state wishes to impose these costs as a condition upon its obligation to provide these services to indigent accused persons (Article I§9).	Investigating indigency: When the state requires proof of indigency as a prerequisite to being afforded counsel, some form of investigation into the indigency would be necessary to preserve the right to counsel where due process requires counsel to be provided.